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No. 295

In the Supreme Court of the United States

OCTOBER TERM 1968

CLARENCE LOTHRIDGE and ZORINA BARNETT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NO.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Clarence Lothridge and Zorina Barnett, respectfully pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Sixth Circuit.

JUDGMENT AND OPINION OF THE COURT BELOW

On June 18, 1968, the Court of Appeals for the Sixth Circuit denied a petition for rehearing of its order entered on December 26, 1967 affirming the judgment of the Dis-

trict Court. The order of December 26, 1967 affirming the conviction is not reported but is appended hereto as Appendix A. The order of June 18, 1968 denying a rehearing is appended hereto as Appendix B.

JURISDICTIONAL STATEMENT

After conviction on July 22, 1966 on a charge of selling narcotics in violation of Sec. 4705(a), Title 26, U. S. Code and of possessing narcotics after the same was imported in violation of Sec. 174, Title 21, U.S. Code, defendants filed their appeal to the Sixth Circuit Court of Appeals which affirmed, on December 26, 1967, because the defendants did not appeal on those counts for which sentence was imposed which did not exceed the sentences imposed on counts on which defendants did appeal.

Thereafter new counsel for petitioners filed their petition for a re-hearing attacking all of the counts in the indictment, which petition was denied because it "presents issues which were available but which were not presented in the briefs and oral argument on appeal." (Appendix B).

The jurisdiction of this court is invoked under Title 18, U. S. Code, Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Should defendants be denied the right of appellate review when their counsel did not raise on appeal obvious constitutional infirmities in the trial, but which errors were presented fully to the reviewing court by new counsel on petition for rehearing?

2. Although the Court of Appeals was eminently correct in its order of December 26, 1967 affirming the conviction

without considering the points raised on appeal because the conviction on certain counts as to which petitioners' counsel did not claim error would sustain the sentence, should not the reviewing court have considered all valid points as set out by new counsel in the petition for rehearing?

3. When it was obvious to the Appellate Court that petitioners' first appellate counsel was inexperienced in presenting proper matters for review because counsel did not attack the sentences as to certain counts to which counsel did not claim error, (although error existed) should not the Court of Appeals have considered the merits of the contentions raised in the Petition for Rehearing, rather than dismissing the contentions because they had not been presented in the original briefs?

4. Was not the trial court in error in failing to instruct on the essential elements of the defense—that of entrapment, being the only defense raised by the defendants?

5. Were not the defendants deprived of a fair trial when the court declined to instruct the jury when the jury requested such instructions during their deliberations?

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

The Sixth Amendment, Sec. 174, Title 21, U. S. Code, and Sec. 4705(a), Title 26 U.S. Code are set out in Appendix C.

STATEMENT OF THE CASE

The facts of the case were simple. A federal narcotic agent, Arthur Lewis, testified he made a telephone call which was answered by the defendant Zorina Barnett; he then talked to the defendant Clarence Lothridge. (Tr. 7-8).[1] Pursuant to the agent's request to come over, he was invited to an apartment; he came, and there, representing himself as one, Cary Stocks, he purchased narcotics for $300. Defendant Lothridge told defendant Barnett to give Lewis a package (of narcotics) which was on a table underneath an ashtray. Lewis paid Lothridge $300 for the package. On a later date, Lewis telephoned again, spoke with defendant Barnett, came over to the apartment and Barnett (without Lothridge this time) sold him another package of narcotics.

Cross-examination developed that the agent never had any dealings or had ever spoken with either defendant before. He never had any transaction with either of them, nor, to his knowledge, did any person have any transaction with either of them. It was obvious, during the cross-examination by defense counsel, that an entrapment defense was being developed; for, the agent was asked, "You initiated this whole incident; is that not correct? That's your testimony." (Tr. 25) Agent Lewis further stated that the first time he talked with either of the parties was on the morning of the telephone call. (Tr. 28) And further that although he was "hoping" they would sell him some heroin (Tr. 3), "I would say they did not actually seek me out, sir, as such." (Tr. 37)

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[1] "Tr." refers to original Transcript of Proceedings of trial testimony as filed in this Court.

The first contact with the defendants was on January 20, 1965. (Tr. 7) The last time he saw either defendant was on January 27, 1965. (Tr. 50-51) No attempt was made to contact either of the parties thereafter. The defendants were not arrested until some time in 1966. (Tr. 51)

Petitioner Lothridge was convicted on Counts 1 and 2 and was sentenced to 10 years on each count, the sentences to run concurrent.

Petitioner Barnett was convicted on all 5 counts and was sentenced to 5 years on each count, the sentences to run concurrent.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

The petitioners were denied the effective assistance of counsel in prosecuting their appeal.

Appellate counsel (who was also trial counsel) filed in the Court of Appeals a 6 page brief, consisting of 3 pages of argument, in which he failed to raise the errors which were obvious to any appellate counsel. But more, he failed to appeal from those counts on which concurrent sentences were imposed upon the petitioners. Accordingly, the Court of Appeals was eminently correct in affirming the judgment of the district court on the basis that counts from which no appeal was taken would support the sentence. *United States* v. *Romano,* 382 U.S. 136.

On the Petition for Rehearing filed in the Court of Appeals by new appellate counsel, the points raised therein would, if held in petitioners' favor, suffice to reverse the convictions on all of the counts. But the Court of Appeals declined to review the matters set out therein stating, "The petition for rehearing filed herein presents issues which were available but which were not presented in the briefs and oral argument on appeal. . ." (App. B)

Thus, because petitioners did not have available for them that effective assistance of counsel as envisaged by the Sixth Amendment to the Constitution they did not have their day in court on review.

While ordinarily a court of review will not take note of errors not called to its attention, that rule is not without exception. *Silber* v. *United States,* 370 U.S. 717. The reviewing court has "the power to notice a 'plain error' though it is not assigned or specified." *United Brotherhood, C.J.* v. *United States,* 330 U.S. 395.

This court has stated that especially in criminal cases appellate courts may of their own motion notice errors if such errors "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Atkinson,* 297 U.S. 157.

It is idle to suppose that any litigant had any effective assistance of counsel where appeal counsel trivialized an appeal having utterly failed to recognize that the appeal could not be successful even if the claimed error had merit and could effect a reversal of the count on which an appeal was taken.

An indigent defendant has the right to effective assistance of counsel on appeal. *Douglas* v. *California,* 372 U.S. 353, *Anders* v. *California,* 386 U.S. 738. Certainly a defendant who hires counsel ought to be afforded no less a right.

We submit, therefore, that the Court of Appeals should have entertained the Petition for Rehearing and considered the points raised therein, rather than denying the petition because the issues were available but not presented in the briefs by previous counsel. Where indigents have claimed the same rights as those litigants who could afford counsel, and were successful in so claiming under the Sixth Amendment to the Constitution, we submit that defendants who engage counsel should have similar rights to the effective assistance of their counsel.

Where the record here demonstrates so blatantly the ineffective assistance of appellate counsel, we submit that in the exercise of its supervisory powers over reviewing courts, that the case should be remanded to the Sixth Circuit Court of Appeals for their consideration of the points raised in the Petition for Rehearing.

II.

The points raised on petition for rehearing in the Court of Appeals but which were not considered by that court.

1.

The failure of the court to instruct the jury on entrapment should be noticed by this court as plain error.

As the case was presented to the jury, the only meaningful defense that could have been raised was that of entrapment. Notwithstanding that no instructions on entrapment were tendered by defense counsel to the court, it was the court's especial duty to instruct under the unique circumstances here.

Failure so to instruct should be noticed by the court as plain error under Rule 52 (b), Federal Rules of Criminal Procedure. Thus the Sixth Circuit has many times reversed under the plain error rule: *Glenn* v. *United States*, 271 F.2d 880, 883 (6th Cir. 1959), *United States* v. *Dunn*, 299 F.2d 548, 554 (6th Cir. 1962), *United States* v. *Readus*, 367 F.2d 689, 692 (6th Cir. 1966).

The unusual situation of which this court should take note is reflected in the colloquy between the trial judge and defense counsel wherein counsel demonstrated he did not prepare any instructions for the court's consideration. When the court requested both counsel to submit instructions neither side submitted any. (Tr. 86)

Defense counsel stated that because the government ended rather early (the jury was selected and the entire government's case presented one morning) he was not prepared to submit his instructions in writing. The court properly requested them in writing. (Tr. 86-87) However,

defense counsel did state, "I would rather have other requests, which you have overruled me on". (Tr. 88) Counsel obviously meant instructions on the entrapment theory of defense because that is what he argued on his motion for acquittal at the close of the government's case. (Tr. 83-86) It is the only defense which was interposed.

That it was obvious defense counsel opened up the area of entrapments is demonstrated by the permissive examination of agent Lewis who testified that he used quite a bit of information from a variety of sources to contact the defendants. (Tr. 54) This generalized hearsay type of evidence is only permissible in rebuttal of a defense of entrapment.

Defense counsel argued for a judgment of acquittal, as a matter of law, that ". . . these defendants were enticed, were entrapped into the alleged criminal act." (Tr. 83). The entire thrust of defense counsel's argument to the court on the motion for acquittal (Tr. 83-85) relates solely and only to entrapment. As counsel stated to the court:

> "In other words, this was an accosting, this was an enticement, that was an entrapment. This was initiated solely by the Government — solely by the Government. There is no testimony whatsoever in this record that these defendants at any time sought out this agent; that they indeed at any prior occasion sold any amount of narcotics either to this agent or to any other known individual; that this . . ." etc. (Tr. 84).

Further, counsel argued to the court: "Now I would submit that under the case law, that the Government is not permitted to entrap, to entice, to solicit an individual to breach or violate a federal law . . ." (Tr. 85)

The court denied the motion stating, "There is insufficient evidence to create an issue of entrapment." (Tr.

86) Although the court had to determine for itself in the first instance whether the facts justified a direction of acquittal to the jury, entrapment was the ultimate factual issue for the jury to find under appropriate instructions. And thus, when the judge instructed the jury, it was plain error not to instruct the jury on the only defense the defendants tendered: that of entrapment. *Wiborg* v. *United States,* 163 U.S. 632, 658; *Brasfield* v. *United States,* 272 U.S. 448, 450; *United States* v. *Atkinson,* 297 U.S. 157, 160.

Entrapment is the conception and planning of an offense by an officer or other person and his procurement of its commission by one who might not have perpetrated it except for the persuasion of the entrapping government agent. *Sorrells* v. *United States,* 287 U.S. 435.

This Court stated in *Sherman* v. *United States,* 356 U.S. 369, 380:

> "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced."

In essence then, the trial court failed to instruct the jury on the only meaningful defense possible under the evidence and on the only defense theory advanced. It is error of constitutional magnitude not to instruct the jury on the theory of defense. *United States* v. *Indian Trailer Corp.,* 226 F.2d 595, 598 (7th Cir., 1955) "A criminal defendant is entitled to have instructions presented relating to any theory of the defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be." *United States* v. *O'Connor,* 237 F.2d 466,

474, n. 8 (2nd Cir., 1956). See also *Tatum* v. *United States*, 190 F.2d 612 (D.C. Cir., 1951) where the court stated, p. 617:

> " . . . the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility."

2.

Defendants were deprived of a fair trial when the court declined to answer the jury's request for assistance the first time.

It was apparent that the jury had some difficulties in determining guilt, notwithstanding that the government's case was short, simple and sweet, and the defendants presented no defense other than the cross-examination of the two government witnesses. Yet, the jury had difficulties. It retired to deliberate at 3:30 P.M. (Tr. 124) Within minutes, at 3:38 P.M., the jurors returned to the courtroom (Tr. 127) and requested the indictment be given them. The court declined to do so. (Tr. 128). At 5:00 P.M. the court on its own motion, called out the jury to inquire if they wanted to continue to deliberate a little longer that day. (Tr. 129). The foreman indicated the jury had a problem with respect to the law of "purchasing" (Tr. 129-130); the judge then instructed on the law of "purchasing", practically directing the jury to find the defendant Barnett guilty on count 5. (Tr. 130).

It was error to foreclose the jury from receiving the help it requested. *United States* v. *Jackson*, 257 F.2d 41 (3rd Cir., 1958); *United States* v. *Fiorito*, 300 F.2d 424 (7th Cir., 1962) After all, the indictment contained the charges

on which the jury was asked to pass upon guilt or innocence. If they were unsure of the charges or needed the indictment, no good reason in law exists why the jury should not have been aided in their request. The trial judge stated: "I have very good reasons for not doing it, which I won't go into here". (Tr. 128). However, the reasons were never made explicit in the record.

Although it is speculative, no one can be sure that if the jury had the indictment the result of their deliberations may have been otherwise. As it was, their deliberations took longer than the presentation of the case.

It may be that the jurors called for the indictment immediately upon their retirement because they were dealing with a multiple-count indictment; and even the judge, in instructing the jury, suggested the difficulties in remembering the allegations. The court stated, *"Now, you will recall perhaps — and maybe you do not, and if you do not, I am not surprised because here we are dealing with a multiple-count indictment . . . "* (Tr. 111) The court then described each count and the elements thereof.

But under our system of law it was incumbent that the jury remember what they are told. "Our theory of trial relies upon the ability of the jury to follow the instructions." *Opper* v. *United States,* 348 U.S. 84, 95. But if the jury has forgotten what to follow, and asks for the indictment almost immediately upon retirement, we respectfully submit it is error not to give it to them. The jury requested assistance to apply the facts to the law. They did not know — or at least needed being refreshed — as to what charges were brought against the defendants.

We respectfully submit that in so vital a constitutional area as this, it was error not to assist the jury immediately upon their request.

CONCLUSION

For the foregoing reasons, we pray that the Petition for Certiorari be granted and that this court either remand the cause to the Court of Appeals for the Sixth Circuit for a consideration of the points set out herein, or that this court note the errors and make known its ruling thereon.

Respectfully submitted,

JULIUS LUCIUS ECHELES
FREDERICK F. COHN
JO-ANNE F. WOLFSON
Attorneys for Petitioners

APPENDIX "A"

NO. 17,822

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

CLARENCE LOTHRIDGE, ZORINA BARNETT

Defendants-Appellants

Before: PHILLIPS, PECK and MCCREE, Circuit Judges.

This is an appeal from a judgment of conviction, following jury trial, of the defendants-appellants under a multiple count indictment charging violations of narcotics statutes. Minimum sentences required by statute were imposed as to each defendant-appellant which are not under attack on this appeal. Additional sentences, in neither case of greater duration than the required minimum just referred to, were imposed under other counts, and it is the convictions under those counts which defendants-appellants here seek to have reviewed. Where a sentence under a count not challenged on appeal is not in excess of sentences imposed under other counts and provided to run concurrently with the former it is unnecessary to consider the validity of such additional convictions on appeal. *Hirabayaski* v. *United States,* 320 U.S. 81 (1943); *United States* v. *Romano,* 382 U.S. 136 (1965); see also *Zachary* v. *United States,* 275 F.2d 793 (6th Cir. 1960). Accordingly,

It Is Ordered that the judgment of the District Court be and it is hereby affirmed.

APPENDIX "B"

NO. 17,822

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

CLARENCE LOTHRIDGE, ZORINA BARNETT

Defendants-Appellants

Before: PHILLIPS, PECK and MCCREE, Circuit Judges.

The petition for rehearing filed herein presents issues which were available but which were not presented in the briefs and oral argument on appeal, and upon consideration,

It Is Ordered that the petition for rehearing be and hereby is denied.

APPENDIX "C"

Sixth Amendment to the Constitution
of the United States

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Title 21, Sec. 174

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction contrary to law, or receives, conceals, buys, sells or in any manner facilitates

the transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any such acts in violation of the laws of the United States . . . (shall be punished).

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26, Sec. 4705(a)

It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given on a form to be issued in blank for that purpose by the Secretary or his delegate.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner Lothridge was convicted on one count of unlawfully selling heroin, in violation of 26 U.S.C. 4705(a), and one count of concealing unlawfully imported heroin, in violation of 21 U.S.C. 174. Petitioner Barnett was convicted on four counts charging violations of the above statutes and one count of purchasing heroin other than from the original stamped package, in violation of 26 U.S.C. 4704(a). Because of a prior narcotics conviction, petitioner Lothridge was sentenced to the statutory minimum term of ten years' imprisonment on each count, the sentences to run concurrently. Peti-

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tioner Barnett was sentenced to concurrent terms of five years' imprisonment on each count.

On January 20, 1968, acting on information received by the Federal Bureau of Narcotics and the results of an independent investigation (Tr. 31), a narcotics agent, using an assumed name, telephoned petitioners and inquired whether he could purchase two quarter-ounces of heroin from them. He received an affirmative reply and was given directions to their apartment (Tr. 8–9). When he arrived at their apartment, the agent paid the $300 which petitioner Lothridge requested, and petitioner Barnett handed him a package of heroin which had been prepared for delivery (Tr. 11–12). Lothridge asked the agent what he used to adulterate his narcotics, and advised him to use bitter lactose, because "[i]t gives the junkies a sting" (Tr. 13).

One week later, the agent made another visit to the apartment, when only Barnett was present. The agent told her that his customers had complained that the heroin which he had purchased from them would not dissolve in water (Tr. 18). Petitioner Barnett replied that "[w]e turn it over just like we get it" (Tr. 57), and that they had not had any complaints in the past (Tr. 19). She then inquired whether he wanted to make another purchase at that time (Tr. 19, 57). When the agent replied in the affirmative, she removed a package of heroin from among a supply of packages which were hidden under a pillow and handed it to him. The agent asked her for a reduction in the price of $150 per spoon, but Barnett replied that he was

getting a good price, since she and Lothridge usually sold the heroin at $160 per spoon (Tr. 19).

Petitioners concede (Pet. 6) that the court of appeals correctly affirmed the judgments, since they did not challenge their convictions on counts on which the concurrent sentences could be sustained (Pet. App. A). Thereafter, present counsel were substituted and petitioned for rehearing, raising the errors presented here. The court of appeals denied the petition on the ground that those claims were available on appeal but had not been raised (Pet. App. B).

There is no substance to petitioners' contention that they were denied effective assistance of counsel by the manner in which their retained counsel prosecuted their appeal. The alleged errors which petitioners claim their lawyer negligently failed to raise provide no grounds for reversal of their convictions.

1. At the close of the government's case, the trial court denied petitioners' motion for a judgment of acquittal on the grounds of entrapment (Tr. 83–86). Thereafter, counsel submitted no request for an instruction on entrapment, and did not object when the court failed to instruct on the subject.[1] The circumstances of the two narcotics transactions described above show beyond question that petitioners were in the business of selling narcotics and that the approaches by the agent "merely afford[ed] opportunities or facilities for the commission of the offense."

[1] The only objections to the instructions raised by counsel pertained to the court's reading of the presumptions set forth in 26 U.S.C. 174 and 26 U.S.C. 4705(a). (Tr. 122–123.)

Sorrells v. *United States*, 287 U.S. 435, 441. The court's failure to give an entrapment instruction on its own motion clearly was not plain error. See *Lopez* v. *United States*, 373 U.S. 427, 436.

2. Shortly after the jury retired, it requested a copy of the indictment. The trial judge refused the request and told the jury that he had fully explained the various charges in the indictment. Petitioners did not object to the court's ruling (Tr. 127–128). About an hour later, when the court was trying to ascertain whether the jury intended to deliberate past 5 p.m., the court said that it would reconsider its ruling if the jury had difficulty understanding the charges (Tr. 129). At that time, the only subject on which the jury requested further clarification was the requirement of a finding of a "purchase" under 26 U.S.C. 4704(a), and the court gave further instructions on that issue (Tr. 130–132). It is within the discretion of the trial court to decide whether the jury should be given a copy of the indictment. *Wall* v. *United States*, 384 F. 2d 758, 763 (C.A. 10); *C.I.T. Corporation* v. *United States*, 150 F. 2d 85, 91 (C.A. 9). There is no indication on the facts of this case that the court abused its discretion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
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